imprisonment. His driving licence was endorsed and he was disqualified from driving for three months from the date of conviction and sentence. He appealed against conviction and sentence.

I allowed the appeal on the following grounds:—

(a) The identity of the deceased person was not conclusively proved. It is not sufficient for the medical officer to say that he received an injured person from a police corporal and that the patient was Abdul Salam s/o Akob. The medical officer had to state as to where he obtained the name of the injured person unless he knew the injured person personally. The police corporal who took Abdul Salam to the hospital did not say in his evidence that he identified Abdul Salam to the medical officer. There is nothing in the record to show how the medical officer obtained Abdul Salam's name. The medical officer stated *inter alia* that the "patient died at 10.30 a.m. the same day" and "I handed the deceased to his relative on same day". In my opinion this is not sufficient to prove identification of the deceased person. The medical officer should have stated clearly that he personally saw the dead body of Abdul Salam s/o Akob and that he personally handed the dead body of Abdul Salam to the relative who should have been called for identification by the medical officer. There does not appear to be in the record of proceedings who this "relative" was. The wife of Abdul Salam simply stated that she accompanied her husband to the hospital with the police and she identified her husband to the police on the same day the husband died.

(b) The prosecution failed to prove the high degree of negligence which is essential to sustain a conviction under section 304A of the Penal Code. From the evidence it would appear that the stretch of road where the accident took place was straight. There was no other traffic at that time. The deceased was cycling with a basket hanging on the handle of the bicycle. It was a dry and clear day. The car driven by the accused was travelling at a normal speed. From the photograph it would appear that the impact was at the crown of the road. The only damage to the car was that its front rear side mudguard was grazed and the rear view mirror mounted on the front rear side mudguard was broken. The overall picture one gets from the recorded evidence was that either the cyclist grazed against the car or the car grazed against the cyclist when it was on the point of overtaking the cyclist. It could even be an error of judgment on the part of the motorist but certainly not of gross negligence.

Finally, may I point out the danger of acting under section 261 of the Criminal Procedure Code. In this case a President of the Sessions Court recorded evidence of eight witnesses. He was then succeeded by the present President of the Sessions Court. The present President recorded further evidence and came to a finding. In his grounds of judgment the learned President stated there was in fact only one eye-witness to the accident, presumably the wife of Abdul Salam whose evidence was recorded by the present President. However the whole record shows there were two other eye-witnesses whose evidence was recorded by the former President. Unless it would cause hardship and great inconvenience to the accused person and witnesses I think it is much better for a President or a Magistrate to hear the case *ab initio* rather than take over the recording of evidence from the other President or Magistrate. For one thing the succeeding President or Magistrate cannot assess the value of the evidence recorded by his predecessor *vis-a-vis* the credibility of the witness.

I allowed the appeal and set aside the conviction and sentence.

Appeal allowed.

Solicitors: *Y. S. Lee & Co.*

KHOO KAY JIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Hepworth J.) December 9, 1963]

[Penang — Criminal Appeal No. 19 of 1963]

Penal Code, s.417—Cheating—Cash transaction—Post-dated cheques given for goods—Cheques not met on presentation—Whether offence of cheating committed.

Criminal Procedure—Charge—Cheating—No specification of deception—No evidence that complainant induced by deception—Whether defective.

Deception is only one element of the offence of cheating. There can be no cheating unless by reason of the deception the person deceived is induced to part with any property or to do or to omit to do anything which he would not do or omit to do but for the deception and which commission or omission caused or was likely to cause him some harm or damage in body, mind, reputation or property.

The giving of a post-dated cheque in lieu of money due with the knowledge that the drawer had no funds in the Bank does not amount to an offence of cheating in the absence of evidence to show that the person to whom the cheque was issued parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would be dishonoured. A post-dated cheque in payment of goods already received is a mere promise to pay on a future date and a broken promise is not a criminal offence.

A charge for cheating is defective if it does not specify the deception which has been practised.

In this case, as the goods were delivered and payment was due on August 15, 1962, in accepting the post-dated cheques on August 18, 1962, the complainant was in no worse position than he had been after the delivery of the goods on August 18 1962, and accordingly he could not be said to have sufferred any damage as a consequence of anything done on August, 18, 1962.

Cases referred to:—

(1) *Tan Peng Aun* v. *Public Prosecutor* [1949] M.L.J. Supp. 10.

(2) *Lim Chin Huat* v. *Regina* [1963] M.L.J. 314.

(3) *Ratra* v. *Ganesh Dass* A.I.R. 1940 Lah. 93.

(4) *Chidambaram Chettiar* v. *Shanmughan Pillai* A.I.R. 1938 Mad. 129.

CRIMINAL APPEAL.

Eusoffe Abdoolcader (*Tan Lye Huat* with him) for the appellant.

Wan Suleiman bin Pawan Teh (Deputy Public Prosecutor) for the respondent.

Hepworth J.: The appellant was convicted in the Magistrate's Court at Penang of an offence of cheating under section 417 of the Penal Code and was sentenced to a term of nine months' imprisonment. From this conviction and sentence the appellant appealed.

The main grounds of appeal upon which the appeal was argued were that the charge disclosed no offence and that in any event the evidence adduced for the prosecution did not support or substantiate a charge under section 417 of the Penal Code.

The brief facts of the case were that the appellant ordered certain goods from the complainant to a value of approximately $14,000, which goods were delivered by the complainant to the appellant on the 15th August, 1962. The complainant in his evidence said that it was a cash transaction. The appellant said in his evidence that it was a credit transaction. Be that as it may counsel for the appellant was prepared to argue the appeal as if the complainant's version that it was a cash transaction was correct. In any event no payment was made on the 15th August, 1962, but on the 18th August, 1962, the complainant accepted from the appellant 4 post-dated cheques dated the 20th, 22nd, 27th and 31st August, 1962, respectively, totalling $14,000 in payment. These 4 cheques were not in fact presented for payment until October, 1962, by which time the appellant's account at the Oversea-Chinese Bank had been closed. Evidence was, however, given by a representative of the Bank that had these cheques been presented for payment on the due dates they would not have been honoured.

The charge read as follows:—

"That you on the 18th day of August, 1962, at about 2.00 p.m. at Cecil Street, Penang, cheated one Teoh Eng Hoe by intentionally inducing the said Teoh Eng Hoe to do something, to wit to allow payment of radios and other goods, to the value at $14,000 by post-dated cheques (1) No. PE/6-571051 for $1,500 dated 20.8.62, (2) No. PE/6-571052 for $2,000 dated 22.8.62, (3) No. PE/6-571053 for $3,500 dated 27.8.62, (4) No. PE/6-571054 for $7,000 dated 31.8.62, all of which were subsequently dishonoured instead of payment in cash on delivery, which the said Teoh Eng Hoe would not do if he were not so deceived, which caused damage to the property of the said Teoh Eng Hoe and that you thereby committed an offence punishable under section 417 of the Penal Code".

With regard to the charge Mr. Abdoolcader submitted on behalf of the appellant that it was defective because it did not specify the deception which had been practised. In *Tan Peng Aun* v. *Public Prosecutor* [1] Thomson J. (as he then was) held that in framing a charge of cheating it is necessary to set out the deception which has been practised. An example of how the deception can be set out in the charge in a charge of cheating by tendering a cheque which is subsequently dishonoured is contained in the case of *Lim Chin Huat* v. *Regina* [2] and it will be seen that in that charge the wording used is "by deceiving him into believing that a Malayan Banking Limited cheque No. SB/RI. 023085 for $6,750 tendered by you in payment for 45 sets of Philips Tape Recorders would be honoured and in so doing dishonestly induced....". It is apparent that the wording of the charge in the present case contains no similar wording. In the charge the complainant is alleged to have been induced to allow payment for radios and other goods by post-dated cheques instead of by cash on delivery, but it is not specified in the charge what the deception was that rendered this inducement dishonest.

It was also submitted on behalf of the appellant that where goods are delivered at an earlier date and post-dated cheques are accepted in payment at a later date and are subsequently dishonoured, that does not mean that a criminal offence has necessarily been committed. In the case of *R. S. Ratra* v. *Ganesh Dass* [3] it was held that deception is only one element of the offence of cheating and not the only element. There can be no cheating unless by reason of the deception the person deceived is induced to part with any property or to do or to omit to do anything which he would not do or omit to do but for the deception. Therefore the giving of a post-dated cheque in lieu of money due with the knowledge that the drawer had no funds in the Bank does not amount to an offence of cheating in the absence of evidence to show that the person to whom the cheque was issued parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would be dishonoured. Again in the case of *M.M.S.T. Chidambaram Chettiar* v. *Shanmughan Pillai* [4] it was held that in an offence of cheating there are two elements, deception and dishonest inducement to do or omit to do something. Mere deception is not a criminal offence. Mere dishonesty is not a criminal offence. To establish an offence of cheating the complainant would have to show not only that he was induced to do or to omit to do a certain act but that this induced commission or omission on his part caused or was likely to cause him some harm or damage in body, mind, reputation or property. A post-dated cheque in payment of goods already received is a mere promise to pay on a future date and a broken promise is not a criminal offence, though it may amount in certain business relations to discreditable behaviour. *Gour* in the Penal Law of India, 6th Edition, Volume 3, at page 1982 puts it like this:—

"The act of drawing a cheque implies at least three statements as to the state of affairs existing at the time when the cheque is drawn; firstly, that the drawer has an account with the bank in question; secondly, that he has authority to draw on it for the amount shown on the cheque; and thirdly, that the cheque, as drawn, is a valid order for the payment of that amount, or that the present state of affairs is such that in the ordinary course of events the cheque will, on future presentment, be honoured. It does not, however, imply any representation that the drawee already has money in the bank to the amount shown on the cheque, for he may either have authority to overdraw, or have an intention of paying in the necessary money before the cheque can be presented. A cheque is only a promise to pay, either

on demand, or upon the date to which it has been posted. Therefore, the only effect of a receipt of payment by a cheque is an acknowledgment that a promise to pay has been given by the drawer to the drawee. The receipt does not extinguish or release any legal right and is not a valuable security even within the last part of section 30. Where, therefore, a person gives a post-dated cheque in payment for goods already received and the cheque is dishonoured, there is only a breach of promise for which the remedy lies in a Civil Court, but the person cannot be held guilty of cheating. The giving of a cheque in lieu of money due even with the knowledge that the drawer has no funds in the bank does not amount to cheating. If the accused intended to deceive the complainant by falsely inducing him to believe that the cheque would be honoured, there is deception, but deception is only one element of the offence of cheating and not the only element. There can be no cheating unless by reason of the deception the person deceived is induced to part with any property or to or omit to do anything which he would not do or omit to do but for the deception".

The questions therefore which have to be asked and answered are:—

(1) What was the complainant induced to do or to omit to do?

(2) What was the deception which constituted the inducement?

(3) Did this induced commission or omission on his part cause or was it likely to cause him some harm or damage in body, mind, reputation or property?

The answer to question (1) according to the charge is that he was induced to allow payment for radios and other goods by post-dated cheques instead of cash. The answer to question (2) does not appear from the charge. Presumably it was making the complainant believe that the cheques would be honoured. Assuming that to be the correct answer to question (2), what is the correct answer to question (3)?

It was argued by the learned Deputy that the complainant had been deceived into accepting these post-dated cheques because he believed they would be honoured, he would not have done that if he had known that the cheques would be dishonoured, and he had therefore suffered damage because he had thereby foregone his right immediately to institute civil proceedings.

The answer to this argument is in my view that the damage spoken of must be the proximate result of the act complained of. If it is a mere possibility and not a necessary consequence of the act an essential element of the offence of cheating is not satisfied. (*Gour*, Penal Law of India, 6th Edition, Volume 3, page 1982). But in any event there was no evidence that it was ever in the contemplation of the complainant that by accepting the post-dated cheques he was foregoing his right immediately to institute civil proceedings, nor was there any evidence whatever that this caused or was likely to cause him any damage.

On the facts of this case assuming that it was a cash transaction it is quite clear that the liability to pay $14,000 for the goods arose when they were delivered on the 15th August, 1962. As from that date the money was due. If he had known on the 18th August, 1962, that the cheques would be dishonoured he would not, of course, have accepted them. But by accepting them on the 18th August, 1962, he did not put himself in any worse position than he had been from the moment when he had delivered the goods without receiving payment, and the purchase price had then become due, on the 15th August, 1962. Accordingly it could not be said that he had suffered any damage as a result of agreeing to accept on the 18th August, 1962, the post-dated cheques in payment, whether he had been dishonestly induced to do so or not.

But quite apart from that the charge does not specify what the deception was and in addition there was no evidence that the complainant was induced by any deception into accepting the post-dated cheques in payment.

I held that the charge was defective in that it did not specify the deception which had been practised, and as the goods were delivered and payment was due on the 15th August, 1962, in accepting the post-dated cheques on the 18th August, 1962, the complainant was in no worse position than he had been after the delivery of the goods on the 15th August, 1962, and accordingly he could not be said to have suffered any damage as a consequence of anything done on the 18th August, 1962.

Taking into consideration all the circumstances of this case I did not consider that it was a case in which I should order a retrial and accordingly I allowed the appeal and quashed the conviction and sentence.

Appeal allowed.

Solicitors: *Tan Lye Huat & Co.*

RATNA AMMAL & ANOR. v. TAN CHOW SOO

[O.C.J. (Hepworth J.) December 19, 1963]
[Penang — Originating Motion No. 13 of 1963]

Trade marks—Application for registration of trade mark by respondent—Agreement between respondent and applicants to develop sale of goods bearing said trade mark—Registration in name of respondent alone—Whether fraudulent—Whether deceptive to public—Rectification or variation of registration—Whether applicants entitled to.

Trade marks—Register—Object of maintaining.

The respondent on August 28, 1961 applied for the registration of the words "Saint Brand" and a device of an old man as a trade mark in respect of milk and other dairy products. On November 3, 1961, the respondent entered into an agreement with the applicants that they should constitute themselves into a syndicate whose object was to develop in various countries the sale of sweetened condensed milk to be supplied by Dutch manufacturers under the "Saint Brand" trade mark. On January 12, 1962, the syndicate entered into an agreement with a firm S.E.N. in which *inter alia* it was recited that